

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

RECEIVED

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

SEP 10 1993  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

IN RE APPLICATIONS OF:

MM DOCKET NO. 93-178

HOWARD B. DOLGOFF  
MARK AND RENEE CARTER

Miramar Beach, Florida

DATE OF CONFERENCE: August 27, 1993

VOLUME: 1

PLACE OF CONFERENCE: Washington, D.C.

PAGES: 1-17

FREE STATE REPORTING, INC.  
Court Reporting Depositions  
D.C. Area (301) 261-1902  
Balt. & Annap. (410) 974-0947

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

RECEIVED

SEP 10 1993

-----)  
 In re Applications of: )

HOWARD B. DOLGOFF )  
 MARK AND RENEE CARTER )

Miramar Beach, Florida )  
 -----)

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

MM Docket No.) 93-178

The above-entitled matter came on for pre-hearing  
 conference pursuant to notice before John M. Frysiak,  
 Administrative Law Judge, at 2000 L Street, N.W., Washington,  
 D.C., in Courtroom No. 4, on Friday, August 27, 1993, at  
 9:00 a.m.

**APPEARANCES:**

On behalf of Mass Media Bureau:

PAULETTE LADEN, Esquire  
 2025 M. Street, N.W.  
 Washington, D.C. 20554

On behalf of the Mark and Renee Carter:

FRANK J. MARTIN, JR., Esquire  
 1275 Pennsylvania Avenue, N.W.  
 Washington, D.C. 20004

On behalf of Howard B. Dolgoff:

IRVING GASTFREUND, Esquire  
 Kaye, Scholer, Fierman, Hays & Handler  
 901 Fifteenth Street, N.W.  
 Washington, D.C. 20005

I N D E XPAGE

1		
2		
3		
4	Statement by Mr. Gastfreund	3
5	Statement by Mr. Martin	4
6	Statement by Ms. Laden	8
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25	Conference Began: 9:00 a.m.	Conference Ended: 9:22 a.m.

FREE STATE REPORTING, INC.  
Court Reporting Depositions  
D.C. Area (301) 261-1902  
Balt. & Annap. (410) 974-0947

## P R O C E E D I N G S

(9:00 a.m.)

1 JUDGE FRYSIAK: We have prehearing conference for  
2 Miramar Beach, Florida. May we note your appearances for the  
3 record?  
4

5 MR. MARTIN: Yes, sir. Frank J. Martin, Jr. for  
6 Mark and Renee Carter, sir.

7 MR. GASTFREUND: Irving Gastfreund of the Law Firm  
8 of Kaye, Sholer, Fierman, Hays & Handler on behalf of Howard  
9 B. Dolgoff.

10 MS. LADEN: For the Chief of the Mass Media Bureau,  
11 Paulette Laden.

12 JUDGE FRYSIAK: All right. Thank you. Well, we  
13 have a short agenda. I guess the first item is settlement.

14 MR. GASTFREUND: Well, I guess I can address that,  
15 Your Honor. Initially I chatted with our client, Mr. Dolgoff,  
16 earlier this week and Mr. Dolgoff reported to me the results  
17 of his efforts to discuss settlement with Mr. Mark Carter and  
18 as it was reported to me, Mr. Dolgoff telephoned Mr. Carter  
19 and explored, I guess it would have to be -- what has to be  
20 view as all three potential permutations of settlement.  
21 Either some sort of joint arrangement/merger, joint venture,  
22 partnership, what have you; a buy-out of one party; a buy-out  
23 of the other party; and unfortunately as reported to me, none  
24 of those approaches seems to have found favor and Mr. Carter  
25 wasn't interested in talking settlement at this stage at

1 | least, so at least at this stage I'm not sure that I can say  
2 | that we have promising hopes of that sort.

3 | JUDGE FRYSIK: All right.

4 | MR. MARTIN: Your Honor, what counsel said is in  
5 | accordance with what I know, based on conversations with Mr.  
6 | Carter, both before that conversation about the prospects of  
7 | settlement and after that conversation. And I, I believe that  
8 | -- I heard also that all three possibilities were discussed  
9 | and the -- while no amounts were stated, the limitation to  
10 | legitimate and prudent expenses was also on the table. So I,  
11 | I have to concur with what counsel said.

12 | JUDGE FRYSIK: All right. Thank you. I guess the  
13 | other item would be any problems -- to consider any problems  
14 | you might have at this stage. Some of the pleadings before me  
15 | are still extent. Time has not run on some of them. I guess  
16 | there's a reply to one.

17 | MR. MARTIN: Your Honor, I feel certain that  
18 | everyone in the room is aware of it now, but to be certain, in  
19 | our reply to the opposition to our Motion to Enlarge Issues,  
20 | we have withdrawn the -- one of the three issues sought.  
21 | Namely, the ones with respect to site location. We were,  
22 | frankly, surprised that Mr. Dolgoff did not concede that that  
23 | was an error in the application because we were relying on the  
24 | maps and where we believed land features on the ground were  
25 | depicted and we have assumed accurately. I, I can tell you

1 that the -- as I stated in the pleading, when we received the  
2 response, we did -- we checked our -- Mr. Carter actually, I  
3 don't know whether he walked it or drove it in the car, but  
4 was able to determine that based on the actual distance on the  
5 ground we, we've lost confidence in what was our firm belief.  
6 I apologize if we caused -- to the extent that we caused  
7 unnecessary work on the part of our opponent. I can assure  
8 you it was done in the best of good faith and we, of course,  
9 promptly withdrew it when we felt that there was no longer --  
10 we didn't have an adequate basis for that accusation. We also  
11 have withdrawn our opposition to the Motion for Summary  
12 Decision with respect to FAA and we have withdrawn our  
13 Countermotion for Summary Decision against, you know, adverse  
14 on the FAA issue, which was based on the -- what we then  
15 assumed to be the error in the location of the site.

16 JUDGE FRYSIK: I noted that.

17 MR. GASTFREUND: The only thing I could add to that,  
18 Your Honor, is that the pleading cycle has obviously run on  
19 the Carter's Petition to Enlarge Issues against Mr. Dolgoff.  
20 And obviously it has not yet run on the reply for -- for Mr.  
21 Dolgoff's reply to the Carter's opposition to Dolgoff's own  
22 Petition to Enlarge Issues against the Carters and, and that  
23 will be filed in due course. But with respect to Mr. -- with  
24 respect to the Carter's Petition to Enlarge, obviously our,  
25 our position is clearly stated in our opposition, not just

1 with respect to the, the, the issue of site availability or  
2 the correct coordinates, but also with respect to the other  
3 two matters that, that were addressed and for the reasons  
4 we've shown in our opposition, we believe not only that  
5 there's no merit, but they're frivolous and I think the time  
6 is -- those matters are ripe for, for action as is the, the  
7 Dolgoff Motion for Partial Summary Decision.

8 JUDGE FRYSIAK: I believe I received a reply  
9 yesterday.

10 MR. MARTIN: Yes, sir.

11 JUDGE FRYSIAK: I'll get to it as soon as I can.  
12 Are there any discovery problems?

13 MR. MARTIN: We haven't encountered any. I, I would  
14 like to say by way of brief, briefly further in regard to what  
15 I talked about earlier. We had asked for a certain document  
16 based on our knowledge that such a document exists, but it  
17 relates to the site issue and we have -- I don't think I have  
18 formally withdrawn that request, but I do formally withdraw  
19 that. I think we did -- we mentioned it on the phone  
20 yesterday. So I withdraw that request, so as far as I'm aware  
21 there are no discovery -- no outstanding discovery issues.

22 JUDGE FRYSIAK: Will there still be a need for an  
23 engineering exhibit?

24 MR. GASTFREUND: Yes, Your Honor, there will. Our,  
25 our view is that -- it's not just our view. I think it's

1 | echoed by the Hearing Designation Order itself, Your Honor,  
2 | and that is that there is a substantial difference in the  
3 | areas and populations and I've discussed with Mr. Martin the  
4 | fact that it would really make sense for us to have a joint  
5 | engineering exhibit prepared by some third party neutral  
6 | engineer that we can both agree on that would map out what the  
7 | respective areas and populations and coverage is. Mr. Martin  
8 | has, has agreed and, you know, that will obviously reflect the  
9 | proposals of each of the two applicants that are set forth in  
10 | their respective applications.

11 | JUDGE FRYSIK: All right, good.

12 | MR. GASTFREUND: And hopefully that will expedite  
13 | matters.

14 | MS. LADEN: Your, Your Honor, I did want to say, the  
15 | date that you set, I believe it's --

16 | JUDGE FRYSIK: 13th of September.

17 | MS. LADEN: -- September 13th. Sometimes there's  
18 | slippage on the date of the preliminary engineering. I would  
19 | appreciate -- the Bureau would appreciate in this case if that  
20 | day were observed, because I'm going on vacation shortly  
21 | thereafter and I would like to get the processing of it  
22 | started before I go.

23 | JUDGE FRYSIK: Did you say to be served on the same  
24 | day -- 13th?

25 | MS. LADEN: On the 13th or, you know, the 14th would



1 be fine. But it would, it would not -- you know, might delay  
2 things by several weeks --

3 JUDGE FRYSIK: Okay.

4 MS. LADEN: -- if it --

5 JUDGE FRYSIK: The slippage you're referring to is  
6 on the part of the claim of the applicants? Is that what  
7 you're --

8 MS. LADEN: Pardon? Yes, Your Honor.

9 JUDGE FRYSIK: The slippage you're referring to --

10 MS. LADEN: Yes, Your Honor.

11 JUDGE FRYSIK: -- is on the part of --

12 MS. LADEN: Sometimes there's -- because it's so far  
13 in advance of the final exhibit date, sometimes -- and it's  
14 usually is the first procedural date to come up. Sometimes  
15 the engineer doesn't have it ready or, or something like that  
16 happens. Frequently that happens and in this case I just  
17 wanted to make clear in advance that we would be reluctant to  
18 consent to an extension of the date because it would be very  
19 inconvenient for us to have it be like --

20 MR. MARTIN: That's well understood and I believe we  
21 can accommodate -- I'd like to say a word, if I may. Mr.  
22 Gastfreund correctly states that we discussed this and that I  
23 agreed that we should explore the possibility of a joint  
24 exhibit and -- but I -- not categorically. I think we have,  
25 we have, we have to discuss that and I'm sure that you're talk

1 -- talk about methodology and so forth, but we certainly  
2 intend to pursue that and have no reason to believe that we  
3 will not have a joint exhibit by that date.

4 MR. GASTFREUND: Well, the -- obviously we're -- if  
5 I misunderstood, I apologize. I, I don't quite know what Mr.  
6 Martin is referring to by methodology. I think it's pretty  
7 established among Washington consulting engineers what needs  
8 to go into such an exhibit.

9 MR. MARTIN: Okay. My understanding is based on the  
10 experience that there can be different approaches to the  
11 population aspect of the, of the showing and that's something  
12 that we ought to discuss. I don't think we'll problem.

13 JUDGE FRYSIK: All right. Well -- time is short.  
14 The -- it's due the 13th of September.

15 MR. MARTIN: Yes, sir.

16 JUDGE FRYSIK: All right. Is there anything else?

17 MR. MARTIN: Your Honor, I feel that, you know,  
18 counsel says that our motion in regard to the addition of the  
19 issue is frivolous and frankly I think that is -- that it  
20 clearly is not frivolous and would like a moment to address  
21 that, but I recognize that it's in the pleadings and perhaps  
22 you would not care to hear anything about it, but in view of  
23 what he said, I'd like to respond.

24 JUDGE FRYSIK: I didn't read the pleadings.

25 MR. MARTIN: All right, sir. Well, my -- I don't --

1 of course, the -- first, the issue's not whether it's  
2 frivolous or not. The issue is whether you should add -- in  
3 my view, the issue is whether having denied our request to  
4 certify for review at this time on a, on a, you know, during  
5 the hearing process, whether you should add an issue to make a  
6 record on the question which we attempted to raise regarding  
7 the absence of a showing as to pertinent contours and in  
8 regard to the applicable substantive standard for a  
9 directional showing pursuant to the grandfathering provision  
10 of Section 73.213. I'd just like to say that it is our -- my  
11 strong feeling and belief that there is a substantive question  
12 about which reasonable persons can differ obviously, because  
13 of the anomaly that a -- an applicant for a proposed -- for a  
14 facility, for a license from the Commission, should -- can  
15 fail to provide the study which shows whether his directional  
16 proposal does what it's intended to do. I think it is  
17 anomalous that a party could be thought to rely on the bureau  
18 to do that study, as they had to do in this case.

19 MS. LADEN: Your Honor --

20 MR. MARTIN: I'm -- may I, may I finish -- and I  
21 believe, sir, that there is a substantive issue which you  
22 dealt with in your order, but which the Commission staff did  
23 not address in the designation order. Whether the -- once you  
24 have imported -- well, there's an issue whether Section 213  
25 permits a directional showing, because Section 213 itself just

1 says a proposal of no, no more than 3 kW. The question is,  
2 when you import the directional possibility into Section 213,  
3 whether it comes with the procedural and substantive  
4 limitations, which the Commission imposed under Section 215.  
5 I do not think that is a frivolous question. I think it's one  
6 on which the Commission might differ from -- in a review of  
7 the matter, and as far as I know, the Commission has not  
8 reviewed the matter -- might differ from the staff. And I  
9 believe that it would be reasonable to make a record here,  
10 which as far as I know could be done by stipulation.

11 MS. LADEN: Your Honor, we would oppose such a  
12 stipulation on such a record here. First of all, Your Honor,  
13 you have denied a motion to certify correctly in our view. We  
14 have stated our opposition to the certification. We've stated  
15 our opposition to the issue. Mr. Martin has appropriately  
16 sought certification. Once Your Honor denied certification,  
17 I've never seen a situation where a request for an issue comes  
18 in. The issue was decided in the Hearing Designation Order.  
19 I believe the Atlantic case, Your Honor, stands for the  
20 proposition that you can't add an issue that was rejected in  
21 the Hearing Designation Order. He can seek certification, you  
22 can order certification. That procedure was followed here.  
23 We don't believe certification is necessary. And certainly in  
24 every case where an applicant believes that the Commission  
25 would disagree with the staff, and I'm sure there are many,

1 you can't certify a case to the Commission, you can't have a  
2 hearing issue on the off-chance that the Commission might  
3 disagree and later remand the case. If that were the case,  
4 you would add every issue that was requested. What happens  
5 when the Commission disagrees with the staff is that the case  
6 gets remanded if necessary or the case gets reversed. There  
7 is a procedure for appeals of cases after the case is over  
8 with. But the Commission has decided that it does not wish to  
9 review Hearing Designation Orders except in very narrow  
10 circumstances until the case has gone through the hearing  
11 process. In this case, we believe Your Honor appropriately  
12 found that there wasn't such a novel question of law and there  
13 isn't, Your Honor. That the case should -- that everything  
14 should stop so that the Commission should consider this  
15 Hearing Designation Order.

16 JUDGE FRYSIK: Yes, sir.

17 MR. GASTFREUND: Your Honor, I would echo counsel's  
18 sentiment, counsel for the Mass Media Bureau. We have -- in  
19 our pleading, our opposition pleading speaks for itself. I  
20 certainly don't intend to regurgitate it here, but other than  
21 to say that on the merits of the hard look issue or Section  
22 73.215 issue, however one characterizes it, we've addressed  
23 that. We've shown and so has the Bureau shown why, on the  
24 merits, that issue has no merit, but the most important  
25 reason, just so that there's no misunderstanding. Aside from

1 the fact that the merits just aren't there, the reason we  
2 characterize it as a frivolous Petition to Enlarge is very  
3 simply because precedent is very, very clear in this case for  
4 the reasons we've cited in our opposition pleading. That it's  
5 well-established that whereas here the Hearing Designation  
6 Order provides a reasoned analysis of the issue in question,  
7 the presiding judge is precluded as a matter of law from  
8 revisiting the determinations that are -- that have been  
9 reached in the Hearing Designation Order and that's the law  
10 under Atlantic Broadcasting Company, 5 FCC Rec. 5 -- 5 FCC 2d  
11 717 (1966), George E. Cameron, Jr. Communications, 91 FCC 2d  
12 870 (Rev. Bd. Dec. 1982), Simon Geller, 90 FCC 2d 250 (1982),  
13 and Central Alabama Broadcasters, Inc., 88 FCC 2d 1501 (Rev.  
14 Bd. Dec. 1982). And this, this clearly established principle  
15 of law has been repeatedly made known in our pleadings on  
16 behalf of Mr. Dolgoff.

17 JUDGE FRYSIK: Yes, I noted that in my --

18 MR. GASTFREUND: And, and, and the reality is, for  
19 Mr. -- for the Carters, notwithstanding that, even if it were  
20 to be assumed that they weren't aware of Atlantic and its  
21 progeny earlier, in the face of this clear line of precedent,  
22 to nonetheless press for addition of an issue, in our view is  
23 frivolous and an abuse of process.

24 MR. MARTIN: Your Honor, I know of one precedent  
25 where an Administrative Law Judge, in denying certification --

1 I wish I could cite the case now. I cannot, but I will  
2 provide that citation, suggested that it would be appropriate  
3 to seek an issue to make a record and I will supply that  
4 citation. I don't question, Your Honor, the propriety of  
5 your ruling denying an appeal at this -- on an interlocutory  
6 basis, but the very fact that an appeal, if it -- if you agree  
7 that it is not frivolous and it does present a question, might  
8 be appropriate for Commission review. I believe that it makes  
9 sense to make a record, Your Honor.

10 JUDGE FRYSIK: All right. I understand.

11 MR. MARTIN: And that's the basis for our request.

12 JUDGE FRYSIK: I understand your position.

13 MS. LADEN: Your Honor, I just wonder if I could say  
14 just two more things. First of all, to make a record in every  
15 case where the Hearing Designation Order does not add an issue  
16 and discusses why an issue is not put in or discusses why a  
17 certain approach has been taken, Your Honor, I don't think you  
18 have the authority to do that, I would respectfully submit.  
19 But even if you did, I don't think we can -- I mean, we --  
20 that could happen in every single case where there might be a  
21 chance that the Commission would disagree with the staff. His  
22 client is not precluded from seeking an appeal. When this is  
23 all over, he can appeal that question with the Commission.

24 JUDGE FRYSIK: I understand. You said that  
25 already.

1 MS. LADEN: Yes. And the second point I wanted to  
2 make, which I didn't say and I didn't want to leave a  
3 misunderstanding, and that is, as we've said at least twice,  
4 when Mr. Martin first filed his Request for Certification, we  
5 looked at this again. Our engineers looked at this whole  
6 matter again. There is nothing unusual about the case. They  
7 feel very comfortable about it. They don't feel it's  
8 controversial and I want to make clear that this amendment,  
9 which it was an amendment, something which Mr. Martin has  
10 never once said, and that's crucial because the hard look  
11 approach does not apply to amendments. This amendment was  
12 processed under Section 215, not Section 213. So all the  
13 requirements of Section 213 don't matter. That's my  
14 understanding of -- those are the two crucial points that Mr.  
15 Martin ignores.

16 MR. GASTFREUND: No, it's the other way around.

17 MS. LADEN: It's the other way around? It was --

18 MR. GASTFREUND: 213. I'm sorry, it --

19 MS. LADEN: Oh, I stand corrected. Okay.

20 MR. GASTFREUND: Yeah. It was processed under  
21 Section 73.213 --

22 MS. LADEN: 13, and not 215.

23 MR. GASTFREUND: -- Your Honor, not 215.

24 MS. LADEN: The requirement for the contour showing  
25 is under Section 215 --



1 MR. GASTFREUND: Right.

2 MS. LADEN: -- and not Section 213. There was no  
3 requirement to show the contours.

4 MR. MARTIN: Your Honor, I call attention to our  
5 footnote, which addresses the point about the amendment. We  
6 have not ignored it. We have taken it fully into account and  
7 it is -- the matter is, is submitted as far as I'm concerned.

8 MR. GASTFREUND: One last thought, Your Honor. Two,  
9 two quick points that have not yet been raised that I just  
10 think are important to stress here. Number one, Mr. Martin  
11 raised -- says that there is now a question as to whether  
12 Section 73213 -- .213 allows for directionalization. I have  
13 to say that in all the three or four bites of the apple that  
14 Mr. Martin has tried on this issue, only in his very last  
15 pleading does he raise this issue. This question that, for  
16 the first time, about whether or not this novel concept of  
17 whether 73.213 allows for directionalization. As a -- aside  
18 from all other questions presented here, the reality is it's  
19 too little, too late. If he wanted to raise this, he should  
20 have raised it earlier. There is no issue about the propriety  
21 of directionalization under 73.213 in any event. Secondly,  
22 one of the things that Mr. Martin alluded to was the question  
23 of the, the study supposedly done by the Mass -- by the Mass  
24 Media Bureau. That the Mass Media Bureau had to do some sort  
25 of a study because we did not supply it on behalf of Mr.

FREE STATE REPORTING, INC.

Court Reporting Depositions

D.C. Area (301) 261-1902

Balt. & Annap. (410) 974-0947

1 Dolgoff. Well, aside from the fact that we didn't have to  
2 supply any Section 73.215 study because we weren't asking for  
3 processing under that section, I, I, I can't let the  
4 opportunity pass without saying that we object strenuously to  
5 this kind of argument based on internal commission processing  
6 at the processing line. We think it was highly inappropriate.  
7 Whatever the Commission did to process or not to process is  
8 absolutely of no probative value in this proceeding.

9 MR. MARTIN: Your Honor, once again I have to  
10 contradict the principle point counsel made. We certainly did  
11 raise the question of whether Section 73.213 permits a  
12 directional showing and assumed that if it did, it would  
13 require that the minimal standards for all directional  
14 showings of -- which are spelled out in Section 215 would  
15 apply. Counsel is mistaken.

16 JUDGE FRYSIK: All right, gentlemen. I understand  
17 your positions. I'll get to them as soon as I can. Is there  
18 anything else for our consideration? If not, then we stand  
19 adjourned until the 26th of October. Thank you very much.

20 MR. GASTFREUND: Thank you, Your Honor.

21 MR. MARTIN: Thank you, sir.  
22  
23  
24  
25

**CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER**

IN APPLICATIONS OF MIRAMAR, FLORIDA

Name

MM DOCKET NO. 93-178

Docket No.

Washington, D. C.

Place

August 27, 1993

Date

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 17, inclusive, are the true, accurate and complete transcript prepared from the reporting by BARBARA LORD in attendance at the above identified proceeding, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription Statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the proceeding and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the proceeding.

Sept. 3, 1993

Date

  
Martha K. Conner, Transcriber  
Free State Reporting, Inc.

Sept. 7, 1993

Date

  
Diane S. Windell, Proofreader  
Free State Reporting, Inc.

Sept. 7, 1993

Date

  
Barbara J. Lord, Reporter  
Free State Reporting, Inc.

**FREE STATE REPORTING, INC.**

Court Reporting Depositions  
D.C. Area 261-1902  
Balt. & Annap. 974-0947